No. 439

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In the Supreme Court of the United States

JOHN DOOLIN, d/b/a National Novelty Company, et al.,
Plaintiffs-Appellants,

vs.

MARSHALL KORSHAK, Director of Revenue, et al.,
Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

APPELLANTS' JURISDICTIONAL STATEMENT

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APPELLANTS' JURISDICTIONAL STATEMENT

Appellants appeal from the judgments of the Illinois Supreme Court rendered March 28, 1968 and May 28, 1968, on which latter date that Court denied the petition for rehearing filed by appellants and rendered the same judgment, but issued a modified opinion, both judgments holding the Illinois Leasing Occupation Tax Act and related Acts immune to appellants' contentions that those Acts offended both the Constitution of the United States and that of the State of Illinois.

OPINIONS BELOW

The opinions of the Illinois Supreme Court are not yet officially reported. They appear on that Court's Agenda 35—November, 1967, as Docket No. 40630.

A copy of the original opinion issued March 28, 1968 is attached hereto as Appendix A.

A copy of the modified opinion issued May 28, 1968 is attached hereto as Appendix B.

The opinion of the Circuit Court of Cook County, Illinois, reference to which is necessary to ascertain the arena of historical development in which the judgments by the Illinois Supreme Court were rendered and the grounds for those judgments, appears verbatim in the "Brief and Argument" filed by these appellants with the Illinois Supreme Court at pages 15 to 19, inc.

THE JURISDICTION OF THIS COURT

Statute

The jurisdiction of this Court to review this matter on direct appeal rests on 28 U.S.C., Sec. 1257 (2).

Grounds

Appellants filed a Complaint for Injunction and Other Relief on August 2, 1967, subsequently amended, which Amended Complaint, filed August 8, 1966, assailed on Federal and State Constitutional grounds the validity of the following Statutes of the State of Illinois:

Leasing Occupation Tax Act approved July 20, 1965, effective August 1, 1965 (Ch. 120, pars. 453.101-453.109, inc., Ill. Rev. Stats. 1965). Attached hereto as Appendix C.

Leasing Use Tax Act, approved July 20, 1965, effective August 1, 1965 (Ch. 120, pars. 453.121-453.140, inc., Ill. Rev. Stats. 1965). Attached hereto as Appendix D.

Municipal Leasing Occupation Tax Act (Ch. 24, par. 8-11-6, Ill. Rev. Stats. 1965). Attached hereto as Appendix E.

County Leasing Occupation Tax Act (Ch. 34, par. 409.4 (formerly par. 25.05-5, Ill. Rev. Stats. 1965). Attached hereto as Appendix F.

The offensiveness of the above statutes to both Federal and State Constitutions was specifically alleged and contended in appellants' complaint, the provisions assailed being:

Section 8, Article 1 (Commerce Clause), the Fifth Amendment, and the Fourteenth Amendment to the Constitution of the United States; Section 2 of Article 2, Sections 1, 13 and 22 of Article 4 of the Constitution of the State of Illinois. (Ill. Supr. Ct. Abst. of Rec., pp. 8-40).

The Circuit Court of Cook County, Illinois specifically passed upon these contentions, stating:

"I therefore find the Acts challenged, valid, and immune to the State and Federal constitutional objections made, I so hold." (Ill. Supr. Ct. Abst. of Rec., page 19).

The Federal and State constitutional objections were reiterated and argued in Appellants' Brief, and again orally before the Illinois Supreme Court.

The Illinois Supreme Court considered, passed upon, and held the statutes assailed valid over those Federal and State constitutional objections. (Ill. Supr. Ct. Ops. App. A and B)

Notice of appeal to this Court from the judgments rendered by the Illinois Supreme Court on March 28, 1968, and May 28, 1968, was filed with the Clerk of the Illinois Supreme Court on August 22, 1968. The statutory provision relied upon to confer this Court's jurisdiction of this direct appeal is 28 U.S.C., Sec. 1257 (2).

The cases relied upon to sustain the jurisdiction of this Court are. *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250; *American Steel and Wire Co.* v. *Speed,* 192 U.S. 500; *Norton Co.* v, *Department of Revenue,* 340 U.S. 534; *Northwest Airlines* v. *Minnesota,* 322 U.S. 292; *Aero Transit v. Com'rs.,* 332 U.S. 495; *Bode* v. *Barrett,* 412 Ill. 204, 220; *Co-ordinated Transport of Ill.* v. *Barrett,* 344 U.S. 583, rehearing denied 345 U.S. 931.

STATEMENT OF THE CASE AND THE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

I.

Appellants respectfully urge this Court to grant a hearing in this Court to appellants for the reason that the "Commerce Clause" of the United States Constitution has been again misconstrued by the Illinois Supreme Court. Appellants are persons engaged in Illinois as both private carriers and carriers for hire with leased vehicles in intrastate commerce. As such carriers in intrastate commerce, said appellants are, by virtue of the provisions of the Illinois Leasing Use Tax Act and the companion Leasing Occupation Tax Act, required to pay the tax levied thereby. Said Tax Acts levy a tax upon both lessors and lessees in Illinois for the privilege of leasing and using leased vehicles for the transportation of goods in *intrastate commerce*. Persons leasing similar vehicles for movement in *interstate commerce are exempted* from the taxing provisions of said Acts. Plaintiffs-Appellants complained in the Illinois courts of the invalidity of said exemption in that the said Acts of the General Assembly of Illinois do violence to the Commerce Clause of the United States Constitution. Said Acts permit some persons to lease vehicles as "rolling stock" to be used in interstate commerce free of the tax, while identical or similar vehicles used as "rolling stock" in intrastate commerce are required to bear the burden of said tax. In its initial opinion in the instant case the Supreme Court of Illinois held the "rolling stock" provision of the challenged statute to relate *solely* to the locomotives, motor cars, passenger cars, or coaches, freight cars, etc., running or capable of running on tracks or rails. The Supreme Court

relied upon the term "rolling stock" as it was used in the Constitution of Illinois in Article IX, adopted in 1870. Following a Petition for Rehearing by these appellants urging the infirmity of said portion of the Supreme Court's judgment, a modified opinion issued out of that Court which omitted the Court's conclusion that the "rolling stock" exemption was limited only to rolling stock of a railroad. The Court, however, refused to strike down the unconstitutional, complete exemption found in said taxing Acts for "rolling stock" used in interstate commerce. This left the lessors and lessees of motor vehicles in intrastate commerce burdened with a discriminatory tax.

The Supreme Court of Illinois completely ignored the objection urged by the appellants in intrastate commerce concerning the unconstitutional exemption of rolling stock leased for use in interstate commerce and ignored the cited authorities of this Court. Appellants respectfully submit that it does not require extended study of these cases of this Honorable Court construing the "Commerce Clause" to immediately recognize the fact that it is not necessarily every movement in interstate commerce across State lines that is of necessity accorded blanket exemption by the Commerce Clause from local State taxes. On the contrary, the cases of this Court spell out the rule that even interstate commerce is required to pay its fair share for local privileges enjoyed. Hence, it follows from the decided cases that for the General Assembly of Illinois to tax persons who engage as lessors in the business of leasing in Illinois vehicles to lessees who will use such vehicles in interstate commerce in and out of Illinois just as lessors and lessees of intrastate vehicles are taxed would in no way transgress the Commerce Clause.

In *American Steel and Wire Co.* v. *Speed*, 192 U.S. 500, Chief Justice White of this Honorable Court indicated that the essence of the illegality depended upon whether a State's exertion of taxing power actually operated upon interstate commerce so as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. The Chief Justice indicated that State taxes may not amount to a regulation in the sense of the Constitution even though they levy a tax which remotely and indirectly affects interstate commerce. This case alone indicates the importance of determining when an actual burden upon interstate commerce is, in fact, evidenced. To tax vehicles leased for interstate movement *precisely* as that leased for intrastate movement is not offensive to the Constitution of the United States, as held by the Illinois Supreme Court in this matter.

In *Norton Company* v. *Department of Revenue*, 405 Ill. 314, the Court considered the question of whether an Illinois tax upon the use of articles by residents in the State of Illinois could or could not be the subject of a tax where the property in question moved in interstate commerce before the use. The Court therein observed that it has been said that the essence of constitutionality, as determined by the Commerce Clause, is no longer, if it ever was, determined by whether a State provision directly affects interstate commerce. It has been said that essentially the point to be considered is whether the interstate commerce is unconstitutionally "burdened" by the State regulation or tax. In resolving such a test, it has been said that constitutionality of the burden placed upon the interstate commerce is determined by looking to whether the tax causes interstate commerce to carry *more than a fair share* of the cost of the local government whose protection it enjoys. Appellants respectfully suggest that the trend of

recent Supreme Court pronouncements is based upon the foregoing concept. Valid state legislation seeks only to avoid unfair discrimination against interstate commerce. Surely while making this effort to guard against unfair discrimination against interstate commerce it becomes equally necessary to guard against unfair discrimination against the State's local commerce. It is patently unfair to make local commerce pay for the cost of local facilities whose protection is likewise enjoyed by those who are exempted from the instant tax which is challenged. *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250, again, is authority from this Court for the proposition that to require interstate commerce to assume its fair share of local taxation constitutes neither a burden nor a discrimination against such commerce in violation of the Commerce Clause.

Lessees and lessors of vehicles used in intrastate commerce are taxed under the challenged statutes while lessees and lessors of vehicles used in interstate commerce are completely exempted from the assailed tax acts. The result, we respectfully submit, is non-uniformity, and denial to the Plaintiffs-Appellants of due process of law, and the equal protection of the law, in violation of the constitutional provisions found in section 2 of Article II, section 1, Article IX, section 22, Article IV, all of the Constitution of the State of Illinois, as well as the Fifth and the Fourteenth Amendments to the United States Constitution, all of which was ignored by the Supreme Court of Illinois.

Plaintiffs-Appellants rely upon:

American Steel etc. v. *Speed,* 192 U.S. 500.

Northwest Airlines v. *Minnesota,* 322 U.S. 292, 306 (1944).

Chicago, M. & St. P. Ry. Co. v. *Westby,* 178 Fed. 691.

Hendrick v. *Maryland,* 235 U.S. 610 (1915).
Bode v. *Barrett,* 412 Ill. 204, 220 (1953).
Clark v. *Poor,* 274 U.S. 554, 577 (1927).
Aero Transit v. *Com'rs.,* 332 U.S. 495, 502-(1947).
Dixie-Ohio v. *St. Revenue Com.,* 306 U.S. 72 (1939).
Hicklin v. *Coney,* 290 U.S. 169 (1933).
Deppman v. *Murray,* 5 Fed. Supp. 661, 672, 673 (D.C. W.D. Wash., 1934).

The Court is directed to page 13 of the State's Brief in which appellees endeavor to argue in defense of the exemption of interstate leasing. The appellees rest their argument upon *Helson* v. *Kentucky,* 279 U.S. 245, which held a Kentucky use tax on an interstate carrier of fuel purchased outside of Kentucky to be a violation of the Commerce Clause. This however will not serve as good authority for sustaining the instant exemption. In the *Helson* case the Court voided that tax for it was a classical example of discrimination against interstate commerce alone. Kentucky failed to tax local carriers in Kentucky for use of such fuel and therein lay the discrimination for which that tax was held to violate the "Commerce Clause." The exemption of the Illinois lessors of interstate vehicles cannot possibly be justified upon the authority of the *Helson* case.

The Supreme Court of Illinois said in *I. B. M.* v. *Korshak,* 34 Ill.2d 595 at 606:

> "The objective of the provision seems to be to avoid conflict with the commerce clause of the constitution of the United States." (Referring to the exemption of interstate leasing).

This subject received careful consideration in the Supreme Court of Illinois in *City of Chicago* v. *Willett,* 406 Ill. 286, 409 Ill. 480, and finally in 1 Ill.2d 311, 313. The Illinois Supreme Court initially was of the opinion that the Chicago Ordinance though valid was invalid as applied to Willett

since it ran afoul of the Commerce Clause. But, that Court ultimately said, "by a subsequent opinion, the high bench reversed our judgment holding that under the circumstances of the parties * * * a tax of reasonable proportions such as the one in question not shown in fact to be a burden on interstate commerce, is not inconsistent with the Commerce Clause." (*City of Chicago* v. *Willett Co.*, 344 U.S. 574, 97 L.Ed. 333.)

Hence, we now submit it is apparent that the legislative objective which seemingly purported to avoid conflict with the Commerce Clause was in fact needless for the Highest Court has held no such conflict flows from a tax which is reasonable and has repeatedly ruled that the test is whether interstate commerce is asked to carry more than a fair share of the cost of the local government whose protection it enjoys. (See cases cited pp. 40, 41 Appellant's Brief.)

Interstate lessors and lessees based in Illinois cannot be permitted to enjoy all the protection of local government in Illinois and yet be heard to complain thereafter that a tax required of intrastate carriers for hire should not be reasonably paid by such interstate carriers for hire as well.

Remaining for consideration after admitting that this specific exemption is not truly justified by virtue of the Commerce Clause is the question whether there is factual or reasonable basis for classifying such lessees differently, and since it has not been affirmatively proven that a real and substantial difference exists, the exemption must fail.

II.

The totality and cumulative effect of the Federal and State constitutional objections to which the statutes assailed are amenable, and as contended by these appellants so patently reveals the repugnancy of those statutes to Federal constitutional essentials of valid enactments respected

and demanded by this Court that the failure by the Illinois Supreme Court to recognize this and so hold denies these appellants due process and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

III.

The criteria upon which the Illinois Supreme Court founds its authority to respect appellants' Federal constitutional objections to the statutes assailed, themselves are so novel, that their employment is obnoxious to the Fifth and Fourteenth Amendments to the Constitution of the United States because their employment effectively denies these appellants due process and equal protection of the law. This Court's attention is respectfully directed to appellants' Point VII in their Brief to the Illinois Supreme Court, and Point V in appellants' petition for rehearing where this demonstration appears.

The Illinois Supreme Court, on folio 6 of its original opinion disposes of plaintiffs' contentions (which invoke the protection and guarantees of three (3) separate provisions of the Illinois Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States), with the unprecedented sanction and approval of these Acts over such objections, by summarily directing taxpayers, upon whom these Acts, DO NOT place the burden of payment of the tax, and which Acts conceal the time at which these taxpayers will be alleviated from the payment of such tax which is "passed on" to them, "To find out for themselves by asking each lessor every time such taxpayers enter into a leasing transaction, if they are still liable to that lessor for County Leasing Occupation taxes, for which tax such taxpayers are not liable, and which tax this Court has never held can legally be passed on to them.

It is respectfully submitted that judicial approval, validity and constitutionality of Statutes has never been founded on a more unique envisionment of taxpayer demeanment.

Appellants respectfully submit that the questions presented are substantial and require plenary consideration, with briefs on the merits, and oral argument, for their resolution, and request the consideration and order of this Court to this effect.

Respectfully submitted,

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APPENDIX A

Docket No. 40630 — Agenda 35 — November, 1967

JOHN DOOLIN, d/b/a National Novelty Company, *et al.*, Appellants, *vs.* MARSHALL KORSHAK, Director of Revenue, *et al.*, Appellees.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

In *International Business Machines Corporation* v. *Korshak,* 34 Ill.2d 595, the validity of the Leasing Occupation Tax Act, the Leasing Use Tax Act and related taxing statutes was sustained against attack upon numerous constitutional grounds. In the present class action to enjoin the enforcement of those statutes, the appellants, John Doolin and eleven other named plaintiffs, urge again many of the contentions that were disposed of in that case. In addition they attack the validity of the statutes upon other constitutional grounds. The circuit court of Cook County sustained the motion of the Director of the Department of Revenue and other defendants to dismiss the complaint, but ordered that amounts paid under protest be retained in a protest fund pending disposition of the case. The revenue is involved and the plaintiffs have appealed directly to this court.

The Leasing Occupation Tax Act and the Leasing Use Tax Act were repealed by a statute which became effective August 1, 1967 (Ill. Rev. Stat. 1967, chap. 120, pars. 453.101 and 453.121), after the plaintiffs' original brief was filed. In a prefatory statement, the defendants' brief quoted the saving clause of the repealing statute "for the purpose of informing the Court of the present status of the Leasing Occupation Tax Act and the Leasing Use Tax Act, and to establish that this cause is not affected by the

repealing statute". In their reply brief the plaintiffs contend that the effect of the repeal is to require that all amounts paid under protest pursuant to the repealed statutes must be refunded to the taxpayers. It is necessary to dispose of the issue thus raised before considering the other contentions advanced by the plaintiffs.

The repealing Act provides: "However, any taxes imposed under the Acts repealed by this Act with respect to transactions consummated before this Act takes effect shall continue to be assessed and collected in the same manner and to the same extent as if said Acts were not repealed. Also, claims for credit or refund of taxes paid pursuant to those Acts with respect to transactions occurring before the effective date of this Act, may continue to be filed and shall continue to be disposed of in the same manner and to the same extent as if said Acts were not repealed."

We agree with the defendants that the repealing Act has no effect upon the status of this case. The plaintiffs' argument to the contrary is hard to follow. They seem to say that because the Department of Revenue did not, prior to the effective date of the Repealing Act, initiate tax assessment proceedings, they are entitled to the money held in the protest fund. The repealed statutes granted taxpayers a right to an administrative hearing and judicial review to determine the amount of tax due. (Ill. Rev. Stat. 1965, chap. 120, pars. 453.106, 453.131.) But we are unable to see why the Department was under any obligation to institute assessment proceedings with respect to the plaintiffs. Their complaint attacks the validity of the taxing statutes upon various constitutional grounds. Apart from the legal issues thus raised, the complaint does not suggest that any dispute exists as to the amount of taxes due. The

Department therefore had no occasion to institute proceedings for the assessment of the tax. It follows that without regard to our decision in *Fiorito* v. *Jones,* Docket No. 41099, this contention of plaintiffs is without merit.

Plaintiffs' first constitutional objection is that the Leasing Occupation and Leasing Use Tax Acts violate section 13 of article IV of the Constitution of Illinois, which provides that "[n]o act * * * shall embrace more than one subject, and that shall be expressed in the title." (Ill. Const., art. IV, sec. 13.) Plaintiffs note that each Act contains a number of "specific exemptions or exclusions"; and argue that "[t]he fraud and deception sought to be avoided by Section 13, Article 4, of the Constitution of Illinois, arising when the title of a bill fails to give sufficient notice that such bill *includes* classes which the title of the bill does not embrace, is equally apparent, and just as obnoxious when the bill *excludes* numerous classes which the title of the bill embraces." In the *I.B.M.* case (34 Ill.2d at 599, 600) we rejected an attack based on this same constitutional provision. In doing so, we reiterated our statement in *Turner* v. *Wright,* 11 Ill.2d 161, 172, that section 13 of article IV is complied with when "it is clear that all of the provisions of the act deal with a single subject — the imposition of a use tax,— which is clearly expressed in its title." (11 Ill.2d at 172.) We regard these cases as dispositive of plaintiffs' argument and reject the suggestion that the titles of taxing Acts must enumerate all exclusions and exemptions.

The *I.B.M.* case also disposed of plaintiffs' contention that section 13 of article IV of the Illinois constitution is violated "because of the vast number of provisions from other statutes incorporated by * * * reference." In that case we held that the provision that "'no law shall be re-

vised or amended by reference to its title only, but the law revised, or the section amended, shall be inserted at length * * *" does not prohibit incorporation by reference." 34 Ill.2d at 610.

Plaintiffs argue that the statutes under consideration are unreasonably discriminatory in violation of various provisions of the State and Federal constitutions because only the Leasing Occupation Tax Act, and not the Leasing Use Tax Act, excepts from the definition of taxable gross receipts "amounts received by the lessor which are in excess of the fair market value, which shall not be less than cost to the lessor, of the tangible personal property on the date the lease was entered into * * *." (Ill. Rev. Stat. 1965, chap. 120, par. 453.102.) This argument is a restatement of another contention rejected in the *I.B.M.* case. (34 Ill.2d 595-605.) We remain unpersuaded. "'[W]hen the rental receipts exceed the fair market value of the leased property on the date when the lease was entered into, the lessor must continue to collect the leasing tax from the lessee, but he will remit such tax to the Department as leasing use tax instead of as leasing occupation tax since he will then have no offsetting leasing occupation tax liability * * *.' A lessee under a long term lease continues to pay leasing use tax after his rental payments have equaled the fair market value of the leased item. And the lessor continues to remit the tax he collects from the lessee after he has received rental payments equal to the fair market value of the leased item. In this there is no discrimination among lessors or among lessees." 34 Ill:2d at 603-04.

Nor can we accept the plaintiffs' contention that a leasing use tax cannot continue to be collected in the absence of a complementary leasing occupation tax. Their reliance upon *Turner* v. *Wright,* 11 Ill.2d 161, is misplaced. There

we recognized that even under "the broad dictum of *Bachrach* v. *Nelson*, 349 Ill. 579, that the constitution restricts the taxing power of the General Assembly to (1) property taxes on an *ad valorem* basis, (2) occupation taxes and (3) franchise or privilege taxes * * *," a use tax is valid as a "privilege tax." (11 Ill.2d at 164.) And in *Turner* we also pointed out that in *Johnson* v. *Halpin*, 413 Ill. 257, the complementary role of the cigarette use tax afforded an *additional* ground upon which that tax could be sustained. 11 Ill.2d at 165.

Both the Leasing Occupation Tax Act and the Leasing Use Tax Act exempt "the renting or leasing of real property * * * even though the rental or leasing charge includes the right to use some personal property (such as furniture and furnishings) in connection with the use of such real property." (Ill. Rev. Stat. 1965, chap. 120, pars. 453.102, 453.122.) The plaintiffs argue that although an owner of a furnished apartment house or hotel, who purchased furnishings for installation in the apartments or hotel rooms that he rents, pays neither an Illinois Use Tax nor a tax under the Leasing Occupation Tax Act, one of the plaintiffs is a lessee of an unfurnished apartment who was compelled under the Use Tax Act to pay a tax on the furniture he purchased for use in his apartment. Therefore, the plaintiffs argue, the exemption is special legislation which violates section 22 of article IX of the Constitution of Illinois and the due process and equal protection clauses of the 14th amendment to the Constitution of the United States.

Faced with a similar objection in the *I.B.M.* case, we held that the exemption in question "is a reasonable recognition of the differences between the two kinds of leases, and of the difficulties of allocating value in real estate

leases between personal property on the one hand and fixtures and other real property on the other." (34 Ill.2d at 605.) Implicit in this holding is a rejection of the present contention that the exemption is an irrational and invalid discrimination between taxpayers whose circumstances are identical.

Plaintiffs attack as "discriminatory and unconstitutional" the statutory provisions exempting from taxation the "leasing in this State of tangible personal property to a lessee where such property is moved by an interstate carrier for hire as rolling stock moving in interstate commerce." (Ill. Rev. Stat. 1965, chap. 120, pars. 453.103, 453.123.) In the *I.B.M.* case we declined to rule upon this question because the plaintiffs in that case did not "bring themselves within the class of persons allegedly discriminated against." (34 Ill.2d at 606.) The complaint in the present case asserts that several of the plaintiffs are lessees of motor vehicles leased in Illinois and use those vehicles "not as carriers for hire but move such rolling stock in interstate commerce to transport their own property through and to other States." It also alleges that the plaintiff Doolin leases motor vehicles and uses them solely in Illinois.

But the plaintiffs have misconstrued the statute. They contend that the exemption "is expressly and arbitrarily limited to a specific portion of a class—interstate carriers for hire." Actually the statute is even more limited in scope, exempting only those leasing transactions that involve property moved by such carriers, *as rolling stock.* Rolling stock means "the locomotives, motor cars, passenger cars (or coaches), freight cars (or goods wagons), cabooses, and all other wheeled vehicles, etc., running or capable of running on the tracks or rails." The term is used with this meaning in the constitution, (article IX, section

10) in the Revenue Act, (Ill. Rev. Stat. 1967, chap. 120, pars. 21, 50, 51) and in the Uniform Commercial Code. (Ill. Rev. Stat. 1967, chap. 26, par. 9—103.) By definition, therefore, the exemption is limited to the rolling stock of interstate railroads. No reason is suggested for expanding the meaning of the term as it is used in the present statutes, and we therefore hold that the exemption does not affect the taxability of any motor vehicle carriers, regardless of whether they are for hire or not for hire, or whether they are engaged in intrastate or interstate commerce. The complaint does not suggest that this exemption is arbitrary, or that it adversely affects any of the plaintiffs.

Plaintiffs allege another unconstitutional discrimination in the credit provision of the Leasing Occupation Tax Act. Section 5 provides that "[c]redit against leasing occupation tax liability shall be given for the amount (if any) of Illinois use tax or service tax previously paid or incurred by the person incurring such leasing occupation tax liability on his prior use of such property, including his prior use of such property in the capacity of a lessor, on the condition that such lessor does not charge and collect leasing use tax on the tangible personal property being leased which is the subject of such credit." Plaintiffs contend that this credit results in a leasing occupation tax being passed on to only those lessees whose lessors did not pay a use tax prior to August 1 of 1965. They contend that the lessees of lessors who did not pay such a prior use tax are discriminated against because they must bear the full burden of a subsequent leasing occupation tax. This argument overlooks the fact that the lessees, whose lessors did pay a prior use tax sufficient in amount to exempt them from a leasing occupation tax under the above credit provision are still subject to a leasing use tax. Thus, as de-

fendants stated in their brief, "[i]n each instance the lessee would be bearing an equal tax burden."

The County Leasing Occupation Tax Act (Ill. Rev. Stat. 1965, chap. 34, pars. 409.4, repealed by an act approved July 20, 1967, S.B. No. 1781) empowered counties to tax lessors one-half of one percent of their gross receipts. Because of the "fair market value" limitation on the definition of gross receipts, liability under this Act terminated at the same time it terminated under the Leasing Occupation Tax Act. As has been pointed out, thereafter the same tax that was collected under the Leasing Occupation Tax Act was collectible under the Leasing Use Tax Act, but there was no corresponding county leasing use tax. Plaintiffs note that it is common practice for lessors to pass the burdens of these taxes to their lessees, but that lessees have no way of knowing when their lessors are no longer obligated to remit the additional one half of one percent under the County Leasing Occupation Tax Act. They argue that as a consequence, the taxing scheme embodied in these Acts contains the potential for unjustly enriching lessors. We agree with the defendants: the "bare allegation of unconstitutionality predicated on this argument is totally without merit." The potential for unjust enrichment is negligible, if it exists at all, for as defendants point out, lessees can ascertain the information necessary to determine when county taxes are no longer collectible in the same way the State does—by asking their lessors.

In view of our denial of each of the plaintiffs' constitutional challenges to the Acts under consideration, we need not consider plaintiffs' final two arguments, which are (1) that "the severability clauses of the acts assailed are ineffective, null and void, and violate section 16 of article

IV of the constitution of the State of Illinois'' and (2) that ''the totality and cumulative effect of the objections to which the acts assailed are exquisitely amenable, reveals the repugnancy of those acts to constitutional essentials of valid enactments * * *.'' And since we affirm the dismissal of plaintiffs' complaint on the merits, it is unnecessary to consider defendants' contention that plaintiffs' ''suit * * * can not be brought as a class action.''

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

APPENDIX B

Docket No. 40630—Agenda 35—November, 1967.

JOHN DOOLIN, d/b/a National Novelty Company, *et al.*, Appellants, *vs.* MARSHALL KORSHAK, Director of Revenue, *et al.*, *Appellees.*

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

In *International Business Machines Corporation* v. *Korshak*, 34 Ill.2d 595, the validity of the Leasing Occupation Tax Act, the Leasing Use Tax Act and related taxing statutes was sustained against attack upon numerous constitutional grounds. In the present class action to enjoin the enforcement of those statutes, the appellants, John Doolin and eleven other named plaintiffs, urge again many of the contentions that were disposed of in that case. In addition they attack the validity of the statutes upon other constitutional grounds. The circuit court of Cook County sustained the motion of the Director of the Department of Revenue and other defendants to dismiss the complaint, but ordered that amounts paid under protest be retained in a protest fund pending disposition of the case. The revenue is involved and the plaintiffs have appealed directly to this court.

The Leasing Occupation Tax Act and the Leasing Use Tax Act were repealed by a statute which became effective August 1, 1967, (Ill. Rev. Stat. 1967, chap. 120, pars. 453.101 and 453.121) after the plaintiffs' original brief was filed. In a prefatory statement, the defendants' brief quoted the saving clause of the repealing statute "for the purpose of informing the Court of the present status of the Leasing Occupation Tax Act and the Leasing Use Tax

Act, and to establish that this cause is not affected by the repealing statute". In their reply brief the plaintiffs contend that the effect of the repeal is to require that all amounts paid under protest pursuant to the repealed statutes must be refunded to the taxpayers. It is necessary to dispose of the issue thus raised before considering the other contentions advanced by the plaintiffs.

The repealing Act provides: "However, any taxes imposed under the Acts repealed by this Act with respect to transactions consummated before this Act takes effect shall continue to be assessed and collected in the same manner and to the same extent as if said Acts were not repealed. Also, claims for credit or refund of taxes paid pursuant to those Acts with respect to transactions occurring before the effective date of this Act, may continue to be filed and shall continue to be disposed of in the same manner and to the same extent as if said Acts were not repealed."

We agree with the defendants that the repealing Act has no effect upon the status of this case. The plaintiffs' argument to the contrary is hard to follow. They seem to say that because the Department of Revenue did not, prior to the effective date of the repealing Act, initiate tax assessment proceedings, they are entitled to the money held in the protest fund. The repealed statutes granted taxpayers a right to an administrative hearing and judicial review to determine the amount of tax due. (Ill. Rev. Stat. 1965, chap. 120, pars. 453.106, 453.131) But we are unable to see why the Department was under any obligation to institute assessment proceedings with respect to the plaintiffs. Their complaint attacks the validity of the taxing statutes upon various constitutional grounds. Apart from the legal issues thus raised, the complaint does not suggest that any dispute exists as to the amount of taxes due. The Depart-

ment therefore had no occasion to institute proceedings for the assessment of the tax. It follows that without regard to our decision in *Fiorito* v. *Jones*, Docket No. 41099, this contention of plaintiffs is without merit.

Plaintiffs' first constitutional objection is that the Leasing Occupation and Leasing Use Tax Acts violate section 13 of article IV of the Constitution of Illinois, which provides that "[n]o act * * * shall embrace more than one subject, and that shall be expressed in the title." (Ill. Const., art. IV, sec. 13.) Plaintiffs note that each Act contains a number of "specific exemptions or exclusions"; and argue that "[t]he fraud and deception sought to be avoided by Section 13, Article 4, of the Constitution of Illinois, arising when the title of a bill fails to give sufficient notice that such bill *includes* classes which the title of the bill does not embrace, is eually apparent, and just as obnoxious when the bill *excludes* numerous classes which the title of the bill embraces." In the *I.B.M.* case (34 Ill.2d at 599, 600) we rejected an attack based on this same constitutional provision. In doing so, we reiterated our statement in *Turner* v. *Wright*, 11 Ill.2d 161, 172, that section 13 of article IV is complied with when "it is clear that all of the provisions of the act deal with a single subject,—the imposition of a use tax,—which is clearly expressed in its title." We regard these cases as dispositive of plaintiffs' argument and reject the suggestion that the titles of taxing Acts must enumerate all exclusions and exemptions.

The *I.B.M.* case also disposed of plaintiffs' contention that section 13 of article IV of the Illinois constitution is violated "because of the vast number of provisions from other statutes incorporated by * * * reference." In that case we held that the provision that "no law shall be revised or amended by reference to its title only, but the law

revised, or the section amended, shall be inserted at length * * *' does not prohibit incorporation by reference.'' 34 Ill.2d at 610.

Plaintiffs argue that the statutes under consideration are unreasonably discriminatory in violation of various provisions of the State and Federal constitutions because only the Leasing Occupation Tax Act, and not the Leasing Use Tax Act, excepts from the definition of taxable gross receipts ''amounts received by the lessor which are in excess of the fair market value, which shall not be less than cost to the lessor, of the tangible personal property on the date the lease was entered into * * *.'' (Ill. Rev. Stat. 1965, chap. 120, par. 453.102.) This argument is a restatement of another contention rejected in the *I.B.M.* case. (34 Ill.2d 595-605.) We remain unpersuaded. '' '[W] hen the rental receipts exceed the fair market value of the leased property on the date when the lease was entered into, the lessor must continue to collect the leasing tax from the lessee, but he will remit such tax to the Department as leasing use tax instead of as leasing occupation tax since he will then have no offsetting leasing occupation tax liability * * *.' A lessee under a long term lease continues to pay leasing use tax after his rental payments have equaled the fair market value of the leased item. And the lessor continues to remit the tax he collects from the lessee after he has received rental payments equal to the fair market value of the leased item. In this there is no discrimination among lessors or among lessees.'' 34 Ill.2d at 603-04.

Nor can we accept the plaintiffs' contention that a leasing use tax cannot continue to be collected in the absence of a complementary leasing occupation tax. Their reliance upon *Turner* v. *Wright,* 11 Ill.2d 161, is misplaced. There we recognized that even under ''the broad dictum of *Bachrach* v. *Nelson,* 349 Ill. 579, that the constitution restricts the

taxing power of the General Assembly to (1) property taxes on an *ad valorem basis,* (2) occupation taxes and (3) franchise or privilege taxes * * *," a use tax is valid as a "privilege tax." (11 Ill.2d at 164.). And in *Turner* we also pointed out that in *Johnson* v. *Halpin,* 413 Ill. 257, the complementary role of the cigarette use tax afforded an *additional* ground upon which the tax could be sustained. 11 Ill.2d at 165.

Both the Leasing Occupation Tax Act and the Leasing Use Tax Act exempt "the renting or leasing of real property * * * even though the rental or leasing charge includes the right to use some personal property (such as furniture and furnishings) in connection with the use of such real property." (Ill. Rev. Stat. 1965, chap. 120, pars. 453.102, 453.122.) The plaintiffs argue that although an owner of a furnished apartment house or hotel, who purchased furnishings for installation in the apartments or hotel rooms that he rents, pays neither an Illinois Use Tax nor a tax under the Leasing Occupation Tax Act, one of the plaintiffs is a lessee of an unfurnished apartment who was compelled under the Use Tax Act to pay a tax on the furniture he purchased for use in his apartment. Therefore, the plaintiffs argue, the exemption is special legislation which violates section 22 of article IV of the Constitution of Illinois and the due process and equal protection clauses of the 14th amendment to the Constitution of the United States.

Faced with a similar objection in the *I.B.M.* case, we held that the exemption in question "is a reasonable recognition of the differences between the two kinds of leases, and of the difficulties of allocating value in real estate leases between personal property on the one hand and fixtures and other real property on the other." (34 Ill.2d

at 605.) Implicit in this holding is a rejection of the present contention that the exemption is an irrational and invalid discrimination between taxpayers whose circumstances are identical.

Plaintiffs attack as "discriminatory and unconstitutional" the statutory provisions exempting from taxation the "leasing in this State of tangible personal property to a lessee where such property is moved by an interstate carrier for hire as rolling stock moving in interstate commerce." (Ill. Rev. Stat. 1965, chap. 120, pars. 453.103, .123.) They argue that there is no substantial difference between having goods delivered by vehicles leased by the seller of those goods and having them delivered by vehicles leased by a public carrier.

In the *I.B.M.* case we declined to rule upon this question because the plaintiffs in that case did not "bring themselves within the class of persons allegedly discriminated against." (34 Ill.2d at 606.) The complaint in the present case asserts that several of the plaintiffs, lessees of motor vehicles leased in Illinois, "use said leased vehicles not as carriers for hire but move such rolling stock in interstate commerce to transport their own property through and to other States."

The governing principles are clear. "It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation." (*Klein* v. *Hulman*, 34 Ill.2d 343, 346.) The "prohibition of the Equal Protection Clause goes no further than the invidious discrimination." (*Williams* v. *Lee Optical, Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 573.) "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (*McGowan* v. *Maryland* (1961), 366 U.S. 420, 425-26, 6 L. Ed. 2d 393, 399.)

And "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden* v. *Kentucky,* 309 U.S. 83, 88, 84 L. Ed. 590, 593.

The validity of taxation of private and common carriers at different rates has been recognized both by this court (*Bode* v. *Barrett,* 412 Ill. 204, 244 aff'd 344 U.S. 583, 97 L. Ed. 567,) and by the Supreme Court of the United States (*Dixie Ohio Express Co.* v. *State Revenue Comm'n,* 306 U.S. 73, 78, 83 L. Ed. 495, 500), which has consistently upheld taxes which place a greater burden upon common carriers than upon private carriers. Annot., 75 A.L.R. 13, 24-26.

The provisions attacked in this case, however, exempt only carriers for hire. The same exemption in the Use Tax Act (Ill. Rev. Stat. 1967, chap. 120, par. 439.3) is prefaced by a declaration that its purpose is "[t]o prevent actual or likely multistate taxation." Clearly, it was incorporated into the statutes before us to serve the same purpose. And in view of the decisions upholding tax laws that have incorporated heavier tax burdens upon carriers for hire, we cannot say that the legislature's assumption that those carriers are more likely than private carriers to be subjected to multistate taxation, was unwarranted, or that the plaintiffs have met their burden of establishing that the exemption is not reasonably calculated to prevent multistate taxation. Moreover, since "in taxation even more than in other fields, legislatures possess the greatest freedom in classification," (*Madden* v. *Kentucky,* 309 U.S. 83, 88, 84 L. Ed. 590, 593), we are not willing to question the decision to refuse such protection for private carriers, who, free of the rigid rate regulations imposed on common carriers, can more easily pass taxes such as those imposed to their customers.

Plaintiffs allege another unconstitutional discrimination in the credit provision of the Leasing Occupation Tax Act. Section 5 provides that "[c]redit against leasing occupation tax liability shall be given for the amount (if any) of Illinois use tax or service use tax previously paid or incurred by the person incurring such leasing occupation tax liability on his prior use of such property, including his prior use of such property in the capacity of a lessor, on the condition that such lessor does not charge and collect leasing use tax on the tangible personal property being leased which is the subject of such credit." Plaintiffs contend that this credit results in a leasing occupation tax being passed on to only those lessees whose lessors did not pay a use tax prior to August 1 of 1965. They contend that the lessees of lessors who did not pay such a prior use tax are discriminated against because they must bear the full burden of a subsequent leasing occupation tax. This argument overlooks the fact that the lessees whose lessors did pay a prior use tax sufficient in amount to exempt them from a leasing occupation tax under the above credit provision are still subject to a leasing use tax. Thus, as defendants stated in their brief, "[i]n each instance the lessee would be bearing an equal tax burden."

The County Leasing Occupation Tax Act (Ill. Rev. Stat. 1965, chap. 34, pars. 409.4, repealed by an act approved July 20, 1967, S.B. No. 1781) empowered counties to tax lessors one-half of one percent of their gross receipts. Because of the "fair market value" limitation on the definition of gross receipts, liability under this Act terminated at the same time it terminated under the Leasing Occupation Tax Act. As has been pointed out, thereafter the same tax that was collected under the Leasing Occupation Tax Act was collectible under the Leasing Use Tax Act, but there was no corresponding county leasing use tax. Plain-

tiffs note that it is common practice for lessors to pass the burdens of these taxes to their lessees, but that lessees have no way of knowing when their lessors are no longer obligated to remit the additional one half of one percent under the County Leasing Occupation Tax Act. They argue that as a consequence, the taxing scheme embodied in these Acts contains the potential for unjustly enriching lessors. We agree with the defendants: the "bare allegation of unconstitutionality predicated on this argument is totally without merit." The potential for unjust enrichment is negligible, if it exists at all, for as defendants point out, lessees can ascertain the information necessary to determine when county taxes are no longer collectible in the same way the State does—by asking their lessors.

In view of our denial of each of the plaintiffs' constitutional challenges to the Acts under consideration, we need not consider plaintiffs' final two arguments, which are (1) that "the severability clauses of the acts assailed are ineffective, null and void, and violate section 16, of article IV of the constitution of the State of Illinois" and (2) that "the totality and cumulative effect of the objections to which the acts assailed are exquisitely amenable, reveals the repugnancy of those acts to constitutional essentials of valid enactments * * *." And since we affirm the dismissal of plaintiffs' complaint on the merits, it is unnecessary to consider defendants' contention that plaintiffs' "suit * * * can not be brought as a class action."

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

APPENDIX C

CHAPTER 120 — REVENUE

Leasing Occupation Tax Act

AN ACT in relation to a tax upon persons engaged in the business of renting or leasing tangible personal property to users and to amend Section 1 of the "Retailers' Occupation Tax Act", approved June 28, 1933, as amended, in connection therewith. Approved July 20, 1965. L.1965, p. ——, H.B.No.202.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

453.101 Short title.] § 1. This Act shall be known and may be cited as the "Leasing Occupation Tax Act".

453.102 Definitions.] § 2. "Renting" or "leasing" means any transfer of the possession or right to possession of tangible personal property to a user for a valuable consideration, but does not include the renting or leasing of tangible personal property to a lessee who will in turn act as a lessor of such tangible personal property. The length of the period of any rental or leasing transaction is immaterial.

Renting or leasing, as used herein, does not include the renting or leasing of real property (such as a building or room in a building or apartment) even though the rental or leasing charge includes the right to use some personal property (such as furniture and furnishings) in connection with the use of such real property.

Renting and leasing also does not include the making of a charge for the use of tangible personal property where

the lessor, either himself or through an agent, furnishes the service of operating the property so that the lessor remains in possession of the property because this does not constitute a transfer of possession or right to possession of the property.

Renting or leasing does not include the making of a charge, by a dealer in the kind of property that is involved, for the use of an item of such property as a demonstrator in connection with the dealer's business of selling, where the charge is merely made to recover the costs of operating the item as a demonstrator and is not intended as a rental or leasing charge in the ordinary sense.

"Lessor" means any person engaged in the business of renting or leasing tangible personal property to users. For this purpose, the objective of making a profit is not necessary to make the renting or leasing activity a "business".

"Lessor" does not mean or include any person engaged in a public utility business with respect to any transaction that is subject to tax under The Messages Tax Act.[1] The Public Utilities Revenue Act[2] or The Gas Revenue Tax Act.[3]

"Lessee" means any user to whom the possession, or the right to possession, of tangible personal property is transferred for a valuable consideration, whether such consideration is paid by such "lessee" or by someone else.

The phrase, "gross receipts", from the renting or leasing of tangible personal property, or "rent", means the total rental price or leasing price. Except that amounts received by the lessor which are in excess of the fair market value, which shall not be less than cost to the lessor, of the tangible personal property on the date the lease was entered into shall not be considered "Gross Receipts" under this

Act. In the case of rental or leasing transactions in which the consideration is paid to the lessor on an installment basis, the amounts of such payments shall be included by the lessor in gross receipts or rent only as and when payments are received by the lessor, except in the case that is provided for in Section 3 of this Act[4] with respect to a payment of rent that is made before August 1, 1965, but that applies to a rental or leasing period on or after August 1, 1965.

The phrase, "rental price" or "leasing price" means the consideration for renting or leasing tangible personal property, valued in money, whether received in money or otherwise, including cash, credits, property and services, and shall be determined without any deduction on account of the cost of the property rented or leased, the cost of materials used, labor or service cost or any other expense whatsoever, but does not include charges that are added by lessors on account of the lessor's tax liability under this Act, or on account of the lessor's duty to collect, from the lessee, the tax that is imposed by the "Leasing Use Tax Act",[5] or on account of the lessor's tax liability under the "Municipal Leasing Occupation Tax Act".[6] or on account of the lessor's tax liability under the "County Leasing Occupation Tax Act".[7] The phrase "rental price" or "leasing price" does not include compensation paid to a lessor by a lessee in consideration of the waiver by the lessor of any right of action or claim against such lessee for loss of or damage to personal property rented or leased and also does not include a separately stated charge for insurance or license plate fees or other separately stated charges which are not for the use of tangible personal property.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

[1] Section 467.1 et seq. of this chapter.
[2] Section 468 et seq. of this chapter.
[3] Section 467.16 et seq. of this chapter.
[4] Section 453.103 of this chapter.
[5] Section 453.121 et seq. of this chapter.
[6] Chapter 24, § 8—11—1 et seq.
[7] Chapter 34, § 409.4.

453.103 Imposition of Tax—Rate—Exemptions.] § 3. A tax is imposed upon persons engaged in this State in the business of renting or leasing tangible personal property to users for use in Illinois at the rate of 3½% of the gross receipts received from such business on or after August 1, 1965, under any lease or rental agreement entered into on or after March 1, 1965. If a payment of rent that is received before August 1, 1965, under a lease or rental agreement that is entered into on or after March 1, 1965, applies partly to some period before August 1, 1965, and partly to some period on or after August 1, 1965, that part of the payment which applies to the period on or after August 1, 1965, shall be considered to be gross receipts received on or after August 1, 1965, for the purposes of this Act. The tax herein imposed does not apply to the renting or leasing of tangible personal property to any governmental body, nor to any corporation, society, association, foundation or institution organized and operated exclusively for charitable, religious or educational purposes, nor to any type of leasing or renting which would not be competitive with business enterprises when engaged in by any corporation,

society, association, foundation or institution organized and operated exclusively for charitable, religious or educational purposes.

The tax herein imposed shall not apply to the renting or leasing in this State of tangible personal property to a lessee where such property is moved by an interstate carrier for hire as rolling stock moving in interstate commerce.

453.104 Certificate of registration—Applicable provisions.] § 4. Every person engaged in this State in the business of renting or leasing tangible personal property to users shall apply to the Department (upon a form prescribed and furnished by the Department) for a certificate of registration under this Act. All of the provisions of Sections 2a and 2b of the "Retailers' Occupation Tax Act",[1] in effect on the effective date of this Act, as subsequently amended, shall apply to persons engaged in this State in the business of renting or leasing tangible personal property to users to the same extent as if such provisions were included herein.

[1] Section 441a, 441b of this chapter.

453.105 Returns.] § 5. Except as provided hereinafter in this Section, on or before the last day of each calendar month, every lessor who is subject to this Act shall file a return with the Department, stating:

1. The name of the lessor;

2. His residence address, and the address of his principal place of business, and the address of the principal place of business (if that is a different address) from which he engages in Illinois in the business or renting or leasing tangible personal property to users;

3. Taxable receipts under this Act received by him during the preceding calendar month;

4. The amount of tax due under this Act for such preceding calendar month;

5. The amount of penalty due, if any;

6. Such other information as the Department may reasonably require.

If the lessor's average monthly tax liability to the Department does not exceed $100.00 a month, the Department may authorize his returns to be filed on a quarter annual basis, with the return for January, February and March of a given year being due by April 30 of such year; with the return for April, May and June of a given year being due by July 31 of such year; with the return for July, August and September of a given year being due by October 31 of such year, and with the return for October, November and December of a given year being due by January 31 of the following year.

If the lessor's average monthly tax liability to the Department does not exceed $20.00 a month, the Department may authorize his returns to be filed on an annual basis, with the return for a given year being due by January 31 of the following year.

Such quarter annual and annual returns, as to form and substance, shall be subject to the same requirements as monthly returns.

Notwithstanding any other provision in this Act concerning the time within which a lessor may file his return, in the case of any lessor who ceases to engage in a kind of business which makes him responsible for filing returns under this Act, such lessor shall file a final return under this Act with the Department not more than 1 month after discontinuing such business.

Where the same person has more than 1 business registered with the Department under separate registrations under this Act, such person shall not file each return that is due as a single return covering all such registered businesses, but shall file separate returns for each such registered business.

Refunds made by the lessor during the preceding return period to lessees, on account of tangible personal property returned to the lessor, shall be allowed as a deduction from gross receipts, in case the lessor had theretofore included the receipts from the renting or leasing of such tangible personal property in a return filed by him and had paid the tax imposed by this Act with respect to such receipts. Credit against leasing occupation tax liability shall be given for the amount (if any) of Illinois use tax or service use tax previously paid or incurred by the person incurring such leasing occupation tax liability on his prior use of such property, including his prior use of such property in the capacity of a lessor, on the condition that such lessor does not charge and collect leasing use tax on the tangible personal property being leased which is the subject of such credit.

Where the lessor is a corporation, the return filed on behalf of such corporation shall be signed by the president, vice-president, secretary or treasurer or by the properly accredited agent of such corporation.

The lessor filing the return herein provided for shall, at the time of filing such return, pay to the Department the amount of tax herein imposed less a discount of 2%, or $5.00 per calendar year, whichever is greater, which is allowed to reimburse the lessor for the expenses incurred in keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request.

All moneys received by the Department under this Act shall be paid into the General Revenue Fund of the State Treasury.

In addition to any other return required by this Act, each lessor shall annually file an information return, covering the preceding calendar year (or fiscal year if the lessor files his Federal income tax returns on the basis of a fiscal year). Such annual return shall be filed with the Department on a form prescribed by the Department not more than 30 days after the date set for the filing of such lessor's Federal income tax return. Such annual return to the Department shall include a statement of gross receipts as shown by the lessor's last Federal income tax return. If the total receipts of the business as reported in the Federal income tax return do not agree with the gross receipts reported to the Department of Revenue for the same period, the lessor shall attach to his annual information return a schedule showing a reconciliation of the 2 amounts and the reasons for the difference. The lessor's annual information return to the Department shall also disclose the cost of tangible personal property rented or leased by the lessor during the year covered by such return, opening and closing inventories of such tangible personal property for such year, pay roll information of the lessor's business during such year and any additional reasonable information which the Department deems would be helpful in determining the accuracy of the monthly, quarterly or annual tax returns filed by such lessor as hereinbefore provided for in this Section.

The foregoing portion of this Section concerning the filing of an annual information return does not apply to a lessor who certifies on such annual information return that such lessor is authorized to do business in 2 or more states.

If experience indicates such action to be practicable, the Department may prescribe and furnish a combination or joint return which will enable lessors who are required to file returns hereunder and also under the "Retailers' Occupation Tax Act",[1] to furnish all the return information required by both Acts on the 1 form.

[1] Section 440 et seq. of this chapter.

453.106 Retailers' occupation tax act—Applicability.] § 6. All of the provisions of Sections 2c, 4, 5, 5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h, 5i, 5j, 6, 6a, 6b, 6c, 7, 8, 9, 10, 11, 12 and 13½ of the "Retailers' Occupation Tax Act",[1] in effect on the effective date of this Act as subsequently amended, shall apply to persons engaged in this State in the business of renting or leasing tangible personal property to users to the same extent as if such provisions were included herein. References in such incorporated Sections of the "Retailers' Occupation Tax Act" [2] to retailers, to sellers or to persons engaged in the business of selling tangible personal property shall mean lessors when used in this Act. References in such incorporated Sections to purchasers shall mean lessees when used in this Act. References in such incorporated Sections of the "Retailers' Occupation Tax Act" to sales of tangible personal property shall mean the renting or leasing of tangible personal property when used in this Act.

[1] Sections 441c, 443—451, 452½ of this chapter.
[2] Section 440 et seq. of this chapter.

453.107. Penalties.] § 7. Any lessor who fails to file a return, or to keep books and records as required here, or who makes a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions of this Act, or any officer or agent of a corporation engaged in the business of renting or leasing tangible personal property to users who signs a fraudulent return made on behalf of such

corporation, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in a penal institution other than the penitentiary for not less than 1 month nor more than 6 months, or be both so fined and imprisoned, in the discretion of the court.

Any person who violates any provision of Section 4[1] of this Act is guilty of a misdemeanor and, upon conviction there, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in a penal institution other than the penitentiary for not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person engages in business in violation of Section 4 of this Act shall constitute a separate offense.

Any person who accepts money that is due to the Department under this Act from a taxpayer for the purpose of acting as the taxpayer's agent to make the payment to the Department, but who fails to remit such payment to the Department when due, or who purports to make such payment but fails to do so because his check or other remittance fails to clear the bank or other depository against which it is drawn, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in a penal institution other than the penitentiary for not less than 1 month nor more than 6 months, or be both so fined and imprisoned, in the discretion of the court.

[1] Section 453.104 of this chapter.

453.108 Additional tax.] § 8. The tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof.

453.109 Severability clause—Construction.] § 9. With the exception of Section 10 of this Act,[1] if any clause, sen-

tence, Section, provision or part of this Act or the application thereof to any person or circumstance shall be adjudged to be unconstitutional, the remainder of this Act or its application to person or circumstances other than those to which it is held invalid shall not be affected thereby. It is the expressed intention of the General Assembly that if the tax that is imposed by this Act should be held unconstitutional, then Section 10 of this Act amending Section 1 of the "Retailers' Occupation Tax Act"[2] shall be held unconstitutional, as it is not intended that Section 10 of this Act should be regarded as being severable from the rest of this Act under any circumstances.

[1] Section 440 of this chapter.

[2] Section 440 et seq. of this chapter.

APPENDIX D

LEASING USE TAX ACT

AN ACT in relation to a tax upon the privilege of using rented or leased tangible personal property and to amend Section 2 of the "Use Tax Act", approved July 14, 1955, as amended, in connection therewith. Approved July 20, 1965. L. 1965, p. ....., H.B.No.203.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

453.121 Short title.] § 1. This Act shall be known and may be cited as the "Leasing Use Tax Act."

453.122 Definitions.] § 2. "Renting" or "leasing" means any transfer of the possession or right to possession of tangible personal property to a user for a valuable consideration, but does not include the renting or leasing of tangible personal property to a lessee who will in turn act as a lessor of such tangible personal property. The length of the period of any rental or leasing transaction is immaterial.

Renting or leasing, as used herein, does not include the renting or leasing of real property (such as a building or room in a building or apartment) even though the rental or leasing charge includes the right to use some personal property (such as furniture and furnishings) in connection with the use of such real property.

Renting and leasing also does not include the making of a charge for the use of tangible personal property where the lessor, either himself or through an agent, furnishes the service of operating the property so that the

lessor remains in possession of the property because this does not constitute a transfer of possession or right to possession of the property.

Renting or leasing does not include the making of a charge, by a dealer in the kind of property that is involved, for the use of an item of such property as a demonstrator in connection with the dealer's business of selling, where the charge is merely made to recover the cost of operating the item as a demonstrator and is not intended as a rental or leasing charge in the ordinary sense.

"Lessor" means any person engaged in the business of renting or leasing tangible personal property to users. For this purpose, the objective of making a profit is not necessary to make the renting or leasing activity a "business".

"Lessor" does not mean or include any person engaged in a public utility business with respect to any transaction that is subject to tax under The Messages Tax Act,[1] The Public Utilities Revenue Act[2] or The Gas Revenue Tax Act.[3]

"Lessee" means any user to whom the possession or the right to possession, of tangible personal property is transferred for a valuable consideration, whether such consideration is paid by such "lessee" or by someone else.

The phrase, "rental price" or "leasing price" means the consideration for renting or leasing tangible personal property, valued in money, whether received in money or otherwise, including cash, credits, property and services, and shall be determined without any deduction on account of the cost of the property rented or leased, the cost of materials used, labor or service cost or any other expense whatsoever, but does not include charges that are added by lessors on account of the lessor's tax liability under the

"Leasing Occupation Tax Act",[4] or on account of the lessor's duty to collect, from the lessee, the tax that is imposed by this Act, or on account of the lessor's tax liability under the "Municipal Leasing Occupation Tax Act",[5] or on account of the lessor's tax liability under the "County Leasing Occupation Tax Act".[6] The phrase "rental price" or "leasing price" does not include compensation paid to a lessor by a lessee in consideration of the waiver by the lessor of any right of action or claim against such lessee for loss of or damage to personal property rented or leased and also does not include a separately stated charge for insurance or license plate fees or other separately stated charges which are not for the use of tangible personal property.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

"Lessor maintaining a place of business in this State", or any like term, shall mean and include any lessor:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the lessor or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such lessor or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting business within this State from lessees or prospective lessees by means of catalogues or other advertising, whether the leasing or rental agreements are made by the lessor within or without this State.

[1] Section 467.1 et seq. of this chapter.
[2] Section 468 et seq. of this chapter.
[3] Section 467.16 et seq. of this chapter.
[4] Chapter 120, § 453.101 et seq.
[5] Chapter 24, § 8—11—1 et seq.
[6] Chapter 34, § 409.4.

453.123 Imposition of tax—Rate—Exemptions—Collection and remittance.] § 3. A tax is imposed upon the privilege of using, in this State, tangible personal property which is rented or leased from a lessor. Such tax is at the rate of 3½% of the rental price or leasing price of such property paid to the lessor on or after August 1, 1965, under any lease or rental agreement entered into on or after March 1, 1965. If a payment of rent that is made before August 1, 1965, under a lease or rental agreement that is entered into on or after March 1, 1965, applies partly to some period before August 1, 1965, and partly to some period on or after August 1, 1965, that part of the payment which applies to the period on or after August 1, 1965, shall be considered to be rent paid on or after August 1, 1965, for the purposes of this Act.

The tax herein imposed shall not apply to any governmental body, nor to any corporation, society, association, foundation or institution, organized and operated exclusively for charitable, religious or educational purposes, when using tangible personal property as a lessee, nor to the lessee in any renting or leasing transaction in which the lessor is a corporation, society, association, foundation or institution organized and operated exclusively for

charitable, religious or educational purposes and is engaging in a type of renting or leasing which is not competitive with business enterprises.

The tax hereby imposed shall be collected from the lessee by a lessor maintaining a place of business in this State or a lessor authorized by the Department pursuant to Section 6[1] hereof, and remitted to the Department pursuant to the provisions of Section 9 hereof.[2]

The tax hereby imposed and not paid to a lessor pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.[3]

Lessors shall collect the tax from lessees by adding the tax to the rental price or leasing price of tangible personal property, when rented or leased for use, in the manner prescribed by the Department. The Department shall have the power to adopt and promulgate reasonable rules and regulations for the adding of such tax by lessors to rental prices or leasing prices by prescribing bracket systems for the purpose of enabling such lessors to add and collect, as far as practicable, the amount of such tax.

Wherever possible, the tax imposed by this Act shall, when collected, be stated as a distinct item separate and apart from the rental price or leasing price of the tangible personal property.

The tax herein imposed shall not apply to the use in this State of tangible personal property by a lessee where such property is moved by an interstate carrier for hire as rolling stock moving in interstate commerce.

[1] Section 453.126 of this chapter.
[2] Section 453.129 of this chapter.
[3] Section 453.130 of this chapter.

453.124 Delivery in state—Prima facie evidence of leasing in for use in state.] § 4. Evidence that tangible personal property was rented or leased by any person for delivery to a person residing or engaged in business in this State shall be prima facie evidence that such tangible personal property was rented or leased for use in this State.

453.125 Receipts—List of agents.] § 5. Every lessor maintaining a place of business in this State and renting or leasing tangible personal property for use in this State shall, when collecting the tax as provided in Section 3 of this Act[1] from the lessee, give to the lessee (if demanded by the lessee) a receipt therefor in the manner and form prescribed by the Department. Such receipt shall be sufficient to relieve the lessee from further liability for the tax to which such receipt may refer.

Each such lessor shall list with the Department the names and addresses of all his agents operating in this State and the location of any and all of his offices or other places of business in this State.

[1] Section 453.123 of this chapter.

453.126 Certificate of registration—Foreign retailers—Permit to collect tax.] § 6. Any lessor maintaining a place of business in this State, if required to register under the "Leasing Occupation Tax Act",[1] need not obtain an additional certificate of registration under this Act, but shall be deemed to be sufficiently registered by virtue of his being registered under the "Leasing Occupation Tax Act". Every lessor maintaining a place of business in this State, if not required to register under the "Leasing Occupation Tax Act", shall apply to the Department (upon a form prescribed and furnished by the Department) for a certificate of registration under this Act.

The Department may, in its discretion, upon application, authorize the collection of the tax herein imposed by any lessor not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such lessor shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such lessor to collect the tax upon all tangible personal property rented or leased to his knowledge for use within this State, in the same manner and subject to the same requirements, including the furnishing of a receipt to the lessee (if demanded by the lessee), as a lessor maintaining a place of business within this State. The receipt given to the lessee shall be sufficient to relieve him from further liability for the tax to which such receipt may refer. Such permit may be revoked by the Department as provided herein.

[1] Section 453.101 et seq. of this chapter.

453.127 Advertisement that retailer will absorb tax—Prohibition—Penalty.] § 7. It is unlawful for any lessor to advertise or hold out or state to the public or to any lessee, directly or indirectly, that the tax or any part thereof imposed by Section 3 hereof[1] will be assumed or absorbed by the lessor or that it will not be added to the rental price or leasing price of the property rented or leased, or if added that it or any part thereof will be refunded other than when the lessor refunds the rental price or leasing price and tax. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act.

[1] Section 453.123 of this chapter.

453.128 Tax collected as debt owed to state—Exception.] § 8. The tax herein required to be collected by any lessor pursuant to this Act, and any such tax collected by any lessor shall constitute a debt owed by the lessor to this State, except when such lessor is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the "Leasing Occupation Tax Act"[1] upon his gross receipts from the same transaction.

[1] Section 453.101 et seq. of this chapter.

453.129 Due date—Discounts—Returns—Fund.] § 9. Each lessor required or authorized to collect the tax herein imposed shall pay to the Department the amount of such tax (except as otherwise provided), on or before the last day of the month following the calendar month during which such tax was collected, less a discount of 2% or $5 per calendar year, whichever is greater, which is allowed to reimburse the lessor for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request. A lessor need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the "Leasing Occupation Tax Act"[1] with respect to the renting or leasing of the same property.

Where such tangible personal property is rented or leased on a periodic payment basis, which extends beyond the period of time for which the lessor's return will be filed, the lessor, in collecting the tax, may collect, for each return period, only the tax applicable to that part of the rental price or leasing price actually received during such return period.

All of the provisions of Section 5 of the "Leasing Occupation Tax Act",[2] enacted by the 74th General Assembly, as subsequently amended, shall apply to lessors who are required or authorized to collect tax under this Act to the same extent as if such provisions were included herein.

If experience indicates such action to be practicable, the Department may prescribe and furnish a combination or joint return which will enable lessors who are required to file returns hereunder and also under the "Leasing Occupation Tax Act", the "Retailers' Occupation Tax Act"[3] or the "Use Tax Act",[4] to furnish all the return information required by both Acts on the one form.

Any lessor filing a return hereunder shall also include the total tax upon the rental price or leasing price of tangible personal property rented or leased for use by him, but as to which the tax imposed herein was not collected from the lessor filing such return, and such lessor shall remit the amount of such tax to the Department when filing such return.

All moneys received by the Department under this Act shall be paid into the General Revenue Fund of the State Treasury.

[1] Section 453.101 et seq. of this chapter.
[2] Section 453.105 et seq. of this chapter.
[3] Section 440 et seq. of this chapter.
[4] Section 439.1 et seq. of this chapter.

453.130 Direct return and payment by lessee—Receipt—Registration with department.] § 10. When tangible personal property is rented or leased from a lessor for use in this State by a lessee who did not pay the tax herein imposed to the lessor, and who does not file returns with the Department as a lessor under Section 9 of this Act,[1] such lessee (by the last day of the month following the

calendar month in which such lessee makes any payment upon the rental price or leasing price of such property) shall, except as hereinafter provided in this Section, file a return with the Department and pay the tax upon that portion of the rental price or leasing price so paid by the lessee during the preceding calendar month. Such return shall be filed on a form prescribed by the Department and shall furnish such information as the Department may reasonably require.

When a lessee pays a tax herein imposed directly to the Department, the Department (upon request therefor from such lessee) shall issue an appropriate receipt to such lessee showing that he has paid such tax to the Department. Such receipt shall be sufficient to relieve the lessee from further liability for the tax to which such receipt may refer.

A lessee who is liable to pay leasing use tax directly to the Department only occasionally and not on a frequently recurring basis, and who is not required to file returns as a lessor under Section 9 of this Act, need not register with the Department. However, if such a lessee has a frequently recurring direct leasing use tax liability to pay to the Department, such lessee shall be required to register with the Department on forms prescribed by the Department and to obtain and display a certificate of registration from the Department. In that event, all of the provisions of Section 2a of the "Retailers' Occupation Tax Act"[2] concerning the requirements for registrants to post bond or other security with the Department, and all of the provisions of Section 3 of the "Retailers' Occupation Tax Act"[3] concerning the filing of regular monthly, quarterly or annual tax returns (but not annual information returns), in effect on the effective date of this Act, as subsequently

amended, shall apply to such lessees to the same extent as if such provisions were included herein.

[1] Section 453.129 of this chapter.
[2] Section 441a of this chapter.
[3] Section 442 of this chapter.

453.131 Records, receipts and invoices—Investigations and hearings—Applicable provisions.] § 11. Every lessor required or authorized to collect taxes hereunder and every person using in this State tangible personal property rented or leased from a lessor on or after the effective date hereof shall keep such records, receipts, invoices and other pertinent books, documents, memoranda and papers as the Department shall require, in such form as the Department shall require.

For the purpose of administering and enforcing the provisions hereof, the Department, or any officer or employee of the Department designated, in writing, by the Director thereof, may hold investigations and hearings concerning any matters covered herein and may examine any books, papers, records, documents or memoranda of any lessor or lessee bearing upon the renting or leasing of tangible personal property, the privilege of using which is taxed hereunder, and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of the facts, and may take testimony and require proof for its information.

All of the provisions of Sections 2a, 2b, 2c, 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of proposed assessments shall run from the date when the tax is due rather than from the date when gross receipts are received), 5a, 5b, 5c,

5d, 5e, 5f, 5g, 5h, 5j, 7, 8, 9, 10, 11, 12 and 13½ of the "Retailers' Occupation Tax Act"[1] in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein. References in such incorporated Sections of the "Retailers' Occupation Tax Act"[2] to retailers, to sellers or to persons engaged in the business of selling tangible personal property shall mean lessors when used in this Act. References in such incorporated Sections of the "Retailers' Occupation Tax Act" to purchasers shall mean lessees when used in this Act. References in such incorporated Sections of the "Retailers' Occupation Tax Act" to sales of tangible personal property shall mean the renting or leasing of tangible personal property when used in this Act.

[1] Sections 441a to 444h, 444j, 446 to 451, 452½ of this chapter.
[2] Section 440 et seq. of this chapter.

453.132 Appointment of secretary of state for service of process—Force and effect of service.] § 12. Any nonresident of this State who accepts the privilege extended by the laws of this State to nonresidents of acting as a lessor maintaining a place of business in this State within the meaning of Section 2 of this Act,[1] and any resident of this State who incurs tax liability under this Act as a lessor and who subsequently removes from this State or conceals his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as a lessee and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served

by the Department on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage, prepaid, a like and true certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit.

[1] Section 453.122 of this chapter.

453.133 Foreign retailers—Permit to collect tax—Revocation—Notice—Hearing.] § 13. Whenever any lessor not maintaining a place of business in this State, to whom a permit to collect the tax hereby imposed has been issued pursuant to Section 6[1] hereof, fails to comply with any of the provisions hereof or any orders, rules or regulations of the Department prescribed and adopted hereunder, or when the Department considers the security furnished by such lessor to be inadequate or considers that the tax can be collected more effectively from persons using such property in this State, the Department may, upon notice and

hearing as herein provided, by order revoke the permit issued to such lessor. No order authorized by this Section shall be made until the lessor is given an opportunity to be heard and to show cause why such order shall not be made, and he shall be given at least 7 days' notice of the time, place and purpose of such hearing. The Department shall have the power in its discretion to issue a new permit pursuant to Section 6 hereof after such revocation.

[1] Section 453.126 of this chapter.

453.134 Penalties.] § 14. Any person subject to the provisions hereof who fails to file a return, or who violates any other provision of Section 9 or Section 10 hereof,[1] or who fails to keep books and records as required herein, or who files a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions hereof, or any officer or agent of a corporation subject hereto who signs a fraudulent return filed on behalf of such corporation, or any person who violates any of the provisions of Sections 3, 5 or 7 hereof,[2] is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in a penal institution other than the penitentiary for not less than 1 month nor more than 6 months, or be both so fined and imprisoned in the discretion of the court.

Any person who violates any provision of Section 6 hereof[3] is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in a penal institution other than the penitentiary for not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person is engaged in business in violation of said Section 6 shall constitute a separate offense.

Any person who accepts money that is due to the Department under this Act from a taxpayer for the purpose of acting as the taxpayer's agent to make the payment to the Department, but who fails to remit such payment to the Department when due, or who purports to make such payment but fails to do so because his check or other remittance fails to clear the bank or other depository against which it is drawn, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in a penal institution other than the penitentiary for not less than 1 month nor more than 6 months, or be both so fined and imprisoned, in the discretion of the court.

This Section shall not apply if the violation in a particular case also constitutes a criminal violation of the "Leasing Occupation Tax Act".[4]

[1] Sections 453.129, 453.130 of this chapter.
[2] Sections 453.123, 453.125, 453.127 of this chapter.
[3] Section 453.126 of this chapter.
[4] Section 453.101 et seq. of this chapter.

453.135 Additional tax.] § 15. The tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof.

453.136 Payments made in error—Claims.] § 16. If it shall appear that an amount of tax or penalty has been paid in error hereunder to the Department by a lessee as distinguished from the lessor, whether such amount be paid through a mistake of fact or an error of law, such lessee may file a claim for credit with the Department.

If it shall appear that an amount of tax or penalty has been paid in error to the Department hereunder by a lessor

who is required or authorized to collect and remit the leasing use tax, whether such amount be paid through a mistake of fact or an error of law, such lessor may file a claim for credit with the Department, provided that no credit shall be allowed for any amount paid by any such lessor unless it shall appear that he bore the burden of such amount and did not shift the burden thereof to anyone else (as in the case of a duplicated tax payment which the lessor made to the Department and did not collect from anyone else), or unless it shall appear that he or his legal representative has unconditionally repaid such amount to his lessee (1) who bore the burden thereof and has not shifted such burden directly or indirectly in any manner whatsoever; (2) who, if he has shifted such burden, has repaid unconditionally such amount to the person to whom the burden of such amount was shifted, and (3) who is not entitled to receive any reimbursement therefor from any other source than from his lessor, nor to be relieved of such burden in any other manner whatsoever.

If it shall appear that an amount of tax has been paid in error hereunder by the lessee to a lessor, who retained such tax as reimbursement for his tax liability on the same transaction under the "Leasing Occupation Tax Act",[1] and who remitted the amount involved to the Department under the "Leasing Occupation Tax Act", whether such amount be paid through a mistake of fact or an error of law, the procedure for recovering such tax shall be that prescribed in the "Leasing Occupation Tax Act".

If the payment for which the claim for credit is filed is held in the protest fund of the State Treasury during the pendency of the claim for credit proceedings pursuant to the order of the court in accordance with Section 2a of "An Act in relation to the payment and disposition of

moneys received by officers and employees of the State of Illinois by virtue of their office or employment", approved June 9, 1911, as amended,[2] and if it is determined by the Department or by the final order of a reviewing court under the "Administrative Review Act"[3] that the claimant is entitled to all or a part of the credit claimed, the claimant, instead of receiving a credit memorandum from the Department, shall receive a cash refund from the protest fund as provided for in said Section 2a of "An Act in relation to the payment and disposition of moneys received by officers and employees of the State of Illinois by virtue of their office or employment".

Any credit or refund that is allowed under this Act shall bear interest at the rate of ½ of 1 % per month or fraction thereof from the date when the erroneous payment for which the credit or refund is being allowed was made to the Department until such credit or refund is paid.

Any claim filed hereunder shall be filed upon a form prescribed and furnished by the Department. The claim shall be signed by the claimant (or by the claimant's legal representative if the claimant shall have died or become incompetent), or by a duly authorized agent of the claimant or his legal representative.

A claim for credit shall be considered to have been filed with the Department on the date upon which it is received by the Department. Upon receipt of any claim for credit filed under this Act, any officer or employee of the Department, authorized in writing by the Director of Revenue to acknowledge receipt of such claims on behalf of the Department, shall execute on behalf of the Department, and shall deliver or mail to the claimant or his duly authorized agent, a written receipt, acknowledging that the claim has been filed with the Department, describing the claim in

sufficient detail to identify it and stating the date upon which the claim was received by the Department. Such written receipt shall be prima facie evidence that the Department received the claim described in such receipt and shall be prima facie evidence of the date when such claim was received by the Department. In the absence of such a written receipt, the records of the Department as to when the claim was received by the Department, or as to whether or not the claim was received at all by the Department, are prima facie correct upon these questions in the event of any dispute between the claimant (or his legal representative) and the Department concerning these questions.

[1] Section 453.101 et seq. of this chapter.
[2] Chapter 127, § 172a.
[3] Chapter 110, § 264 et seq.

453.137 Determination of claim—Hearings.] § 17. As soon as practicable after a claim for credit is filed, the Department shall examine the same and determine the amount of credit to which the claimant or the claimant's legal representative, in the event that the claimant has died or become incompetent, is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a photostatic copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such photostatic copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein.

If such claimant, or the legal representative of a deceased or incompetent claimant shall, within 20 days after the Department's Notice of Tentative Determination of Claim, file a protest thereto and request a hearing thereon, the Department shall give notice to such claimant, or the legal representative of a deceased or incompetent claimant, of the time and place fixed for such hearing, and shall hold a hearing in conformity with the provisions of this Act, and pursuant thereto shall issue its Final Determination of the amount, if any, found to be due as a result of such hearing, to such claimant, or the legal representative of a deceased or incompetent claimant.

If a protest to the Department's Notice of Tentative Determination of Claim is not filed within 20 days and a request for a hearing thereon is not made as provided herein, the said Notice shall thereupon become and operate as a Final Determination; and, if the Department's Notice of Tentative Determination, upon becoming a Final Determination, indicates no amount due to the claimant, or, upon issuance of a credit for the amount, if any, found by the Department to be due, the claim in all its aspects shall be closed and no longer open to protest, hearing, judicial review, or by any other proceeding or action whatever, either before the Department or in any court of this State.

Claims for credit hereunder must be filed with and initially determined by the Department, the remedy herein provided being exclusive; and no court shall have jurisdiction to determine the merits of any claim except upon review as provided in this Act.

453.138 Limitations.] § 18. As to any claim for credit filed with the Department on and after January 1 but on or before June 30 of any given year, no amount of tax or penalty or interest erroneously paid (either in total or partial liquidation of a tax or penalty or amount of interest

under this Act) more than 3 years prior to such January 1 shall be credited. As to any such claim filed on and after July 1 but on or before December 31 of any given year, no amount of tax or penalty or interest erroneously paid (either in total or partial liquidation of a tax or penalty or amount of interest under this Act) more than 3 years prior to such July 1 shall be credited.

No claim shall be allowed for any amount paid to the Department, whether paid voluntarily or involuntarily, if paid in total or partial liquidation of an assessment which had become final before the claim for credit to recover the amount so paid is filed with the Department, or if paid in total or partial liquidation of a judgment, order or decree of court.

453.139. Credit memoranda—Issuance—Assignment.] § 19. If it is determined that the Department should issue a credit hereunder, the Department may first apply the amount thereof against any amount of tax or penalty or interest due hereunder, or under the "Leasing Occupation Tax Act",[1] or under the "Retailers' Occupation Tax Act",[2] or under the "Use Tax Act",[3] or under the "Service Occupation Tax Act",[4] or under the "Service Use Tax Act",[5] from the person entitled to such credit. For this purpose, if proceedings are pending to determine whether or not any tax or penalty is due hereunder from such person, the Department may withhold issuance of the credit pending the final disposition of such proceedings and may apply such credit against any amount found to be due to the Department as a result of such proceedings. The balance, if any, of the credit shall be issued to the person entitled thereto.

Any credit memorandum issued hereunder may be used by the authorized holder thereof to pay any tax or penalty or interest due or to become due under this Act or under

the "Leasing Occupation Tax Act", and under the "Retailers' Occupation Tax Act", or under the "Use Tax Act", or under the "Service Occupation Tax Act", or under the "Service Use Tax Act", from such holder. Subject to reasonable rules of the Department, a credit memorandum issued hereunder may be assigned by the holder thereof to any other person for use in paying tax or penalty or interest which may be due or become due under this Act or under the "Leasing Occupation Tax Act", or under the "Retailers' Occupation Tax Act", or under the "Use Tax Act", or under the "Service Occupation Tax Act", or under the "Service Use Tax Act", from the assignee.

If the Department is satisfied that a person who is entitled to a credit will not be able to use the credit in the foreseeable future or cannot sell or assign the credit memorandum to someone else without undue hardship or financial loss, the Department may issue such person a refund certificate in lieu of the credit memorandum on application by such person to the Department for a refund certificate. Refund certificates shall be numbered serially as they are issued and shall be paid in the order of their issuance from any funds that may be appropriated to the Department for that purpose.

[1] Section 453.101 et seq. of this chapter.
[2] Section 440 et seq. of this chapter.
[3] Section 439.1 et seq. of this chapter.
[4] Section 439.101 et seq. of this chapter.
[5] Section 439.31 et seq. of this chapter.

453.140. Severability clause—Construction.] § 20. With the exception of Section 21 of this Act,[1] if any clause, sentence, Section, provision or part of this Act or the application thereof to any person or circumstance shall be adjudged to be unconstitutional, the remainder of this Act

or its application to persons or circumstances other than those to which it is held invalid, shall not be affected thereby. In particular, if any provision which exempts or has the effect of exempting some class of users or some kind of use from the tax imposed by this Act should be held to constitute or to result in an invalid classification or to be unconstitutional for some other reason, such provisions shall be deemed to be severable, with the remainder of this Act without said provision being held constitutional. It is the expressed intention of the General Assembly that if the tax that is imposed by this Act should be held unconstitutional, then Section 21 of this Act amending Section 2 of the "Use Tax Act" shall be held unconstitutional, as it is not intended that Section 21 of this Act should be regarded as being severable from the rest of this Act under any circumstances.

[1] Section 439.2 of this chapter.

APPENDIX E

8-11-6. Municipal leasing occupation tax act.] § 8-11-6. The corporate authorities of a municipality may impose a tax upon all persons engaged in such municipality in the business of renting or leasing tangible personal property to users at the rate of not to exceed one-half of one percent of the gross receipts from such business.

The tax imposed by a municipality pursuant to this Section and all civil penalties that may be assessed as an incident thereof shall be collected and enforced by the State Department of Revenue. The certificate of registration which is issued by the Department to a lessor under the "Leasing Occupation Tax Act"[1] shall permit such registrant to engage in a business which is taxable under any ordinance or resolution enacted pursuant to this Section without registering separately with the Department under such ordinance or resolution or under this Section. The Department shall have full power to administer and enforce this Section; to collect all taxes and penalties due hereunder; to dispose of taxes and penalties so collected in the manner hereinafter provided, and to determine all rights to credit memoranda, arising on account of the erroneous payment of tax or penalty hereunder. In the administration of, and compliance with, this Section, the Department and persons who are subject to this Section shall have the same rights, remedies, privileges, immunities, powers and duties, and be subject to the same conditions, restrictions, limitations, penalties and definitions of terms, and employ the same modes of procedure, as are prescribed in Sections 2, 3 (in respect to all provisions therein other than the State rate of tax), 5 (except as to the disposition of taxes and penalties collected and except for the provision allowing retailers a deduc-

tion from the tax to cover certain costs), 6 (except that credit memoranda issued hereunder may not be used to discharge any State tax liability) and 7 of the "Leasing Occupation Tax Act",[2] as the same are now or may hereafter be amended, as fully as if provisions contained in said Sections of the "Leasing Occupation Tax Act" were set forth herein.

The Department shall forthwith pay over to the State Treasurer, ex-officio, as trustee, all taxes and penalties collected hereunder. On or before the 25th day of each calendar month, the Department shall notify the State Treasurer, in writing, to disburse stated sums of money to named municipalities, said municipalities to be those from which lessors have paid taxes or penalties hereunder to the Department during the second preceding calendar month. The amount to be paid to each municipality shall be the amount (not including credit memoranda) collected hereunder during the second preceding calendar month by the Department, less 4% of such amount, which sum shall be retained by the State Treasurer to cover the costs incurred by the Department in administering and enforcing the provisions of this Section, as provided herein, and said sum so retained by the State Treasurer, shall be paid by him into the General Revenue Fund of the State Treasury.

Within 10 days after receipt, by the State Treasurer, of the disbursement notification, provided for herein to be given to the State Treasurer by the Department, the State Treasurer shall make disbursements in accordance with the directions contained in such notification.

Nothing in this Section shall be construed to authorize a municipality to impose a tax upon the privilege of engaging in any business which under the constitution of the United States may not be made the subject of taxation by this State.

An ordinance or resolution imposing a tax hereunder or effecting a change in the rate thereof shall be effective on the first day of the calendar month next following the expiration of the publication period provided in Section 1-2-4 in respect to municipalities governed by such Section, and on the first day of the calendar month next following the expiration of the 30 day period provided in Section 4-5-21, or on the first day of the calendar month next following the passage of such an ordinance as urgent, in respect to municipalities governed by the provisions of Section 4-5-21.

The corporate authorities of any municipality which levies a tax authorized by this Section shall transmit to the Department of Revenue on or not later than 5 days after the effective date of the ordinance or resolution a certified copy of the ordinance or resolution imposing such tax whereupon the Department of Revenue shall proceed to administer and enforce this Section on behalf of such municipality as of the effective date of the ordinance or resolution. Upon a change in rate of a tax levied hereunder, or upon the discontinuance of the tax, the corporate authorities of the municipality shall on or not later than 5 days after the effective date of the ordinance or resolution discontinuing the tax or effecting a change in rate transmit to the Department of Revenue a certified copy of the ordinance or resolution effecting such change or discontinuance.

As used in this Section, "Municipal" and "Municipality" mean a city, village or incorporated town, including an incorporated town which has superseded a civil township.

This Section shall be known and may be cited as the "Municipal Leasing Occupation Tax Act". Added by act approved July 20, 1965. L.1965, p. ....., H.B.No.207.

[1] Chapter 120, § 453.101 et seq.

[2] Chapter 120, §§ 453.102, 453.103, 453.105, 453.106, 453.107.

APPENDIX F

409.4 County leasing occupation tax act.] § 25.05-5. To impose a tax upon all persons engaged, in such county, in the business of renting or leasing tangible personal property to users at the rate of not to exceed one-half of one-per cent of the gross receipts from such business.

The tax imposed pursuant to this Section and all civil penalties that may be assessed as an incident thereof shall be collected and enforced by the State Department of Revenue. The certificate of registration which is issued by the Department to a lessor under the "Leasing Occupation Tax Act"[1] shall permit such registrant to engage in a business which is taxable under any ordinance or resolution enacted pursuant to this Section without registering separately with the Department under such ordinance or resolution or under this Section. The Department shall have full power to administer and enforce this Section; to collect all taxes and penalties due hereunder; to dispose of taxes and penalties so collected in the manner hereinafter provided, and to determine all rights to credit memoranda arising on account of the erroneous payment of tax or penalty hereunder. In the administration of, and compliance with, this Section, the Department and persons who are subject to this Section shall have the same rights, remedies, privileges, immunities, powers and duties, and be subject to the same conditions, restrictions, limitations, penalties and definitions of terms, and employ the same modes of procedure, as are prescribed in Sections 2, 3 (in respect to all provisions therein other than the State rate of tax), 5 (except as to the disposition of taxes and penalties collected and except for the provision allowing retailers a deduction from the tax to cover certain costs), 6 (except that credit memoranda issued hereunder may not be used to dis-

charge any State tax liability) and 7 of the "Leasing Occupation Tax Act", as the same are now or may hereafter be amended,[2] as fully as if provisions contained in said Sections of the "Leasing Occupation Tax Act" were set forth herein.

The Department shall forthwith pay over to the State Treasurer, ex-officio, as trustee, all taxes and penalties collected hereunder. On or before the 25th day of each calendar month, the Department shall notify the State Treasurer, in writing, to disburse stated sums of money to named counties from which lessors have paid taxes or penalties hereunder to the Department during the second preceding calendar month. The amount to be paid to each county shall be the amount (not including credit memoranda) collected hereunder during the second preceding calendar month by the Department, less 4% of such amount, which sum shall be retained by the State Treasurer to cover the cost incurred by the Department in administering and enforcing the provisions of this Section, as provided herein, and said sum, so retained by the State Treasurer, shall be paid by him into the General Revenue Fund of the State Treasury.

Within 10 days after receipt, by the State Treasurer, of the disbursement notification, provided for herein to be given to the State Treasurer by the Department, the State Treasurer shall make disbursements in accordance with the directions contained in such notification.

Provided, all persons engaged in the business of renting or leasing tangible personal property to users in a municipality shall not be subject to the tax levied by the county board of such county as authorized by this Section with respect to renting or leasing transactions entered into by such persons in the course of so engaging in business in such municipality.

Nothing in this Section shall be construed to authorize a county to impose tax upon the privilege of engaging in any business which under the constitution of the United States may not be made the subject of taxation by this State.

An ordinance or resolution imposing a tax hereunder or effecting a change in the rate thereof shall be effective on the first day of the calendar month next following the month in which such ordinance or resolution is passed. The county board of any county which levies a tax authorized by this Section shall transmit to the Department of Revenue on or not later than 5 days after the effective date of the ordinance or resolution a certified copy of the ordinance or resolution imposing such tax whereupon the Department of Revenue shall proceed to administer and enforce this Section on behalf of such county as of the effective date of the ordinance or resolution. Upon a change in rate a tax levied hereunder, or upon the discontinuance of the tax, the county board of the county shall on or not later than 5 days after the effective date of the ordinance or resolution discontinuing the tax or effecting a change in rate transmit to the Department of Revenue a certified copy of the ordinance or resolution effecting such change or discontinuance.

This Section shall be known and may be cited as the "County Leasing Occupation Tax Act". Added by act approved July 20, 1965. L.1965, p. ....., H.B.No.209.

[1] Chapter 120, § 453.101 et seq.

[2] Chapter 120, §§ 453.122, 453.123, 453.125 to 453.127.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 439

JOHN DOOLIN, d/b/a National Novelty Company, et al.,
Plaintiffs-Appellants,

vs.

MARSHALL KORSHAK, Director of Revenue, et al.,
Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

MOTION TO DISMISS

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Opinion Below

The opinion of the Supreme Court of the State of Illinois is reported at 39 Ill. 2d 521.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

Question Presented

Whether a substantial federal question has been established by the plaintiffs?

Statutes and Ordinances Involved

The Leasing Occupation Tax Act and the Leasing Use Tax Act and related ordinances are set forth in the Appellants' Jurisdictional Statement (J. S. App. 19-57).

Statement of the Case

The opinion of the Supreme Court of the State of Illinois correctly sets forth the Statement of the Case (J. S. App. 10-18).

ARGUMENT

The Appeal Should Be Dismissed For The Plaintiffs Have Failed To Present A Substantial Federal Question.

Section 1 of Article IX of the Constitution of the State of Illinois provides in part:

> "* * * The general assembly shall have power to tax * * * persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

In relation to the foregoing, the Courts have consistently recognized that the State of Illinois possesses the sovereign power to tax any occupation for the purpose of raising revenue. *Department of Finance* v. *Gandolfi,* 375 Ill. 237; *Price* v. *People,* 193 Ill. 114.

Pursuant to the aforementioned legislative grant and the construction thereof by the Courts, the General Assembly enacted the Leasing Occupation Tax Act (Ill. Rev. Stats. 1965, Ch. 120, Pars. 453.101 *et seq.*) (J. S. App. 19) (hereinafter referred to as L.O.T.) and the Leasing Use Tax Act (Ill. Rev. Stats. 1965, Ch. 120, Pars. 453.121 *et seq.*) (J. S. App. 30), (hereinafter referred to as L.U.T.), which are the subject matter of the case at bar.

The imposition of a tax upon the occupation of leasing and the use thereof is relatively new, but such transactions have been held subject to taxation in many jurisdictions. *Union Oil Co.* v. *State Bd. of Equalization,* 386 P. 2d 496 (S. C. Calif., 1963); *Central Trans. Co.* v. *Atkins,* 305 S. W. 2d 940 (S. C., Tenn. 1958); *Peterson* v. *Oklahoma Tax Com.,* 395 P. 2d 388 (S. C. Okla., 1964); *Besser Co.* v. *Bu-*

reau of Revenue, 394 P. 2d 141 (S. C. N. Mex., 1964); *Recording Devices, Inc.* v. *Bowers,* 190 N. E. 2d 258 (S. C. Ohio, 1963); *Lakewood Lanes, Inc.* v. *State,* 380 P. 2d 466, (S. C. Wash. 1963); *State* v. *Kershaw Mfg. Co.,* 137 So. 2d 740 (S. C. Ala. 1962); *Piedmont Canteen Service* v. *Johnson,* 123 S. E. 2d 582 (S. C. No. Car., 1962)); *Young Electrical Sign Co.* v. *Utah State Tax Com.,* 291 P. 2d 900 (S. C. Utah, 1955).

On August 2, 1966, the plaintiffs, who are various lessors and lessees in Illinois of tangible personal property, filed a complaint for injunction and other relief seeking to restrain the collection of the L.O.T. and the L.U.T.

On February 6, 1967, the Circuit Court of Cook County dismissed the cause and this decree was affirmed by the Supreme Court of Illinois in accord with the aforementioned constitutional, statutory and judicial authorities (J. S. App. 1-18).

Examination of the decision of the Supreme Court of Illinois reveals that the plaintiffs raised several state procedural, state constitutional and Federal constitutional issues which were fully considered and ruled upon by that court (J. S. App. 1-18).

The plaintiffs in their Jurisdictional Statement have attempted to predicate jurisdiction upon (1) The Commerce Clause of the United States Constitution; (2) abstract constitutional questions; and, (3) the violation of equal protection clause through the imposition of a different base on the L.O.T. and the L.U.T. (J. S. 5-12).

The defendants submit that none of the foregoing are predicated upon a substantial federal question upon which jurisdiction may be based.

Commerce Clause

The plaintiffs have attempted to create a substantial federal question by suggesting that the "Commerce Clause of the United States" has been misinterpreted by the Supreme Court of the State of Illinois (J. S. 5-10).

The "Commerce Clause" *per se* was not an issue in the state courts, but rather only in relation to the question of uniformity of classification.

After imposing a tax upon all lessors and lessees of tangible personal property in the State of Illinois, the General Assembly exempted from the impact of the Acts, "renting or leasing in this State of tangible personal property to a lessee where such property is moving by an interstate carrier for him as rolling stock moving in interstate commerce." (Ill. Rev. Stat. 1965, ch. 120, pars. 453.103 and 453.123) (J. S. App. 23, 34).

The Illinois Supreme Court in *People ex rel. Holland Coal Co.* v. *Isaacs,* 22 Ill. 2d 477, succintly set forth the *criteria* upon which the Legislature may constitutionaly differentiate between heterogenous classes.

> "The legislature in levying an occupation tax has great latitude in establishing the class to which the tax shall apply. *Reif* v. *Barrett,* 355 Ill. 104, 188 N.E. 889; *Ohio Oil Co.* v. *Wright,* 386 Ill. 206, 53 N.E. 2d 966; *McGrath* v. *City of Chicago,* 309 Ill. 515, 141 N.E. 299. The classifications in tax statutes must be based upon real and substantial differences between persons taxed and those not taxed, (*Ohio Oil Co.* v. *Wright,* 386 Ill. 206, 53 N.E. 2d 966; *City of Chicago* v. *Ames,* 365 Ill. 529, 7 N.E. 2d 294, 109 A.L.R. 1509), and they must bear some reasonable relationship to the object of the legislation, (*Modern Dairy Co.* v. *Department of Revenue,* 413 Ill. 55, 109 N.E. 2d 8,) or to public policy. *Reif* v. *Barrett,* 355 Ill. 104, 188 N.E. 889."

The question therefore is not whether in fact the General Assembly was required to exempt "rolling stock" but rather if a real and substantial difference did exist between intra and inter state commerce.

Basically, the plaintiffs' contention of invalidity, ignores the fact that an exemption is valid if it is based on some reasonable difference in the situation of the parties and need not be based solely upon the federal requirements of the Commerce Clause of the Constitution of the United States. There is a significant difference between interstate and intrastate commerce which alone would justify the exemption.

Furthermore, there is a real possibility that absent the exemption there would in fact be a violation of federal law. In *Helson* v. *Kentucky,* 279 U.S. 245, it was held that a Kentucky use tax on an interstate carrier for its use in Kentucky or on fuel purchased outside the state and used by the carrier in the stream of interstate commerce was a violation of the Commerce Clause. See also *American Oil Co.* v. *Neil,* 380 U.S. 451.

The exemption of rolling stock in interstate commerce was based upon a reasonable difference in classification and is therefore constitutional.

It is apparent that the plaintiffs have failed to establish the existence of a substantial federal question. The "Commerce Clause" is not directly involved but rather only as a basis for a differentiation in classification.

In addition, under Illinois procedure law, the Acts would not become invalid if this specific exemption were unconstitutional, but merely the exemption would fall (*Holland Coal Co.* v. *Issacs,* 22 Ill. 2d 477, 484). The tax would therefore fall upon the lessors and lessees without a class

diminution, and the intrastate carriers would still be subject to taxation.

Tax Base

The plaintiffs suggest generally that the Acts are unconstitutional because the L.O.T. is based on retail value while no limitation is based upon the L.U.T. (J. S. 11)*

In *Turner* v. *Wright,* 11 Ill. 2d 161, the plaintiff attacked the validity of the Use Tax Act because it imposed, by definition, a greater burden on the purchaser than upon the retailer. This Court, in holding said provisions constitutionally permissible, said (p. 168-169):

> "There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon 'selling price,' the latter of 'gross receipts' from sales. 'Selling price' is defined in both statutes to mean the consideration for a sale value in money whether received or paid in money or otherwise, 'including cash, credits, service and property of every kind or nature * * *' (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of 'gross receipts' in the Retailers' Occupation Tax Act was amended so that it 'means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade.' (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3,000 and the buyer's old one is received in trade at $1,000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of

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* Incorporated by Reference—Appellants' Brief Point VII—Illinois Supreme Court.

> the old car would not be included in the 'gross receipts' on which the tax is computed, so that the tax would be $50. The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction. *No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer, for he is required to remit to the Department the full amount that he has collected. That the two are not precisely identical therefore deprives no one of any constitutional rights.* (Emphasis added.)

In the *Turner* case the Court thus held that there was a significant and cognizable difference between a retailer and a purchaser and that because there was no discrimination between the *purchasers,* nor unjust enrichment of the retailer, that no one was deprived of any constitutional rights.

As the Court so found the difference between retailers and purchasers, there is an equal or more significant differentiation between lessors and lessees; a difference which fully justifies the classifications.

In the first instance, the lessor retains all incidents of ownership which carry with it the burden of the possibility of obsolescence, destruction or cancellation of the lease. Conversely, the lessee assumes only the burden to pay rent for the duration of the lease.

As to the lessees as a class, if the tax were to be based on the "fair market value", there is a possibility of an unconstitutional discrimination among the class of lessees. If a lessor were to purchase or manufacture an item with the value of $2,000 and lease it to lessee A for one year

at a rental of $100 per month, lessee A would then incur a tax based on $1,200. If then the lessor entered into a subsequent one year lease for $100 per month to lessee B, lessee B would be only taxed upon the remaining untaxed value: $800. Such an exemption measured by "fair market value" would create a discrepancy within a class.

There are also practical considerations which demand the imposition of a tax on the entire rental proceeds for otherwise it would be of an advantage to the lessee to retain and use obsolete goods which had surpassed their "fair market value". In addition evaluation could be a problem for the "fair market value", not being subject to a sale at retail, could be set an an arbitrary and inequitable amount. Of equal importance is the fact that improvements to the tangible personal property after the date of the lease would escape taxation for the "fair market value" is measured upon the value at the date of the lease.

General Constitutional Allegations

The plaintiffs have attempted to raise additional constitutional questions by stating "The totality and cumulative effect of the Federal and State constitutional objections to which the statutes assailed are amenable, * * *" (J. S. 10-11).

Having this general catch all with which to contend, the defendants refer this Honorable Court to the decision of the Illinois Supreme Court to establish that all constitutional issues raised and ruled upon were so done in full accord with the requirement of the Constitution of the United States.

CONCLUSION

The plaintiffs have failed to establish the existence of a substantial federal question and therefore this appeal should be dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

DOOLIN, DBA NATIONAL NOVELTY CO., ET AL. *v.* KORSHAK, DIRECTOR OF REVENUE, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 439. Decided November 12, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.